No. 83-564

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

C. DULA HAWKINS AND
J. NAT HAMRICK, JR.,

Petitioners,

v.

JNO. McCALL COAL EXPORT CORP. AND
JNO. McCALL COAL CO., INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

CALHOUN BOND,
MORTON A. SACKS,
THOMAS L. CROWE,
RAY R. FIDLER,
CABLE, McDANIEL, BOWIE
& BOND,
900 Blaustein Building,
Baltimore, Maryland 21201,
(301) 752-3650,
Counsel for Respondents.

QUESTION PRESENTED

Did the courts below abuse their discretion in dismissing and affirming dismissal of petitioners' action for petitioners' failure over a fifteen (15) month period to prosecute and obey a court order requiring joinder of an indispensable party, particularly when the district court had granted several extensions of time for compliance and petitioners misrepresented that the absent party had voluntarily joined?

PARTIES TO THE PROCEEDING

Respondents assert that the only proper petitioners before this Court are J. Nat Hamrick, Jr. and C. Dula Hawkins. While the Petition lists Ana Maria Aulet Garcia de Villa as a petitioner, she was never a party to the action in the district court. The district court, in

fact, dismissed the amended complaint for failure of petitioners J. Nat Hamrick, Jr. and C. Dula Hawkins to join her as a party-plaintiff.

Respondents are Jno. McCall Coal Company, Inc. and its wholly owned subsidiary, Jno. McCall Coal Export Corp.*

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*Corporations related to respondents whose identities must be disclosed pursuant to Supreme Court Rule 28.1 are McCall Industrial Lift Trucks, Inc., The Masteller Coal Company, McCall Marketing GmbH, McCall Fuels, Inc., Spring Ridge Coal Co., Eastern Mining Corp., South Atlantic Coal Co., Inc., Anthracite Land Corp., Elkins Valley Coal Co., Inc. and F&M Coal Co. Partnership.

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NO. 83-564

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PETITIONERS,

vs.

JNO. McCALL COAL EXPORT CORP. and
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RESPONDENTS.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS BELOW

On May 31, 1983, the United States Court of Appeals for the Fourth Circuit (Hall, Murnaghan and Sprouse, JJ.) issued a per curiam opinion affirming the district court's dismissal of petitioners' amended complaint. (R. App. A 1a).[1/] The court of appeals held that the district court properly dismissed the action under Rule 41(b), F.R.Civ.P.:

> the plaintiffs failed to comply with the court's order to effect joinder for a period of fifteen months. This failure provided the court with adequate grounds to dismiss the complaint under Federal Rule Civil Procedure 41(b). . . . The failure of a plaintiff to join a party

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[1/] References herein to "P. App." are to the Appendix accompanying the Petition. References to "R. App." are to the Appendices accompanying the Respondents' Brief in Opposition to the Petition.

> after the court rules that it is an indispensable party may result in dismissal of the plaintiffs' action for failure to prosecute under Rule 41(b).

(R. App. A 8a).

The United States District Court for the District of Maryland (Ramsey, J.) had dismissed petitioners' amended complaint for failure to join an indispensable party after having been ordered to do so. (R. App. B 11a). The district court noted with respect to petitioners' failure to join the party:

> plaintiffs have been given a reasonable opportunity to add her as a party, having been ordered to obtain joinder over fifteen months ago and having been given numerous extensions of time based on counsel's

> representations to the Court that joinder was imminent.

(R. App. B 19a).[2/]

THE RULE OF PROCEDURE INVOLVED

Rule 41(b) of the Federal Rules of Civil Procedure provides in pertinent part:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of juris-

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[2/] This portion of the district court's opinion is set forth at pages 27 and 28 of petitioners' Appendix. However, in reproducing the opinion, petitioners have inexplicably omitted the important phrase "having been ordered to obtain joinder over fifteen months ago and". Because petitioners' reproductions of the opinions below contain so many typographical errors and omissions, respondents have reprinted both opinions in their Appendices.

diction, or improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

STATEMENT OF THE CASE

The courts below have well summarized the facts germane to petitioners' application for a writ of certiorari. Petitioners, C. Dula Hawkins and J. Nat Hamrick, Jr., filed their initial complaint against Jno. McCall Coal Export Corp. on April 1, 1980. On October 14, 1980, they amended their complaint to add Jno. McCall Coal Company, Inc. as a party-plaintiff. (The two McCall companies will, hereinafter, be referred to jointly as "McCall".)

Hawkins and Hamrick alleged that they had a contract with McCall which granted them an exclusive agency to sell McCall's coal to "SOMISA", a corporation

owned by the Argentine government. While petitioners never alleged they sold McCall's coal to SOMISA, they claimed entitlement to commissions on sales which McCall had made independently.[3/]

During discovery, Hamrick stated that in addition to himself and Hawkins, three other partners or co-venturers were members of the group with which McCall had allegedly contracted. The three additional partners, who represented an approximate sixty percent (60%) interest in the partnership but who were not named plaintiffs, were Petersen Enterprises (a Florida corporation), Ruben Antonio (an

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3/ McCall's position on the merits was that it had no contract with petitioners or, alternatively, that petitioners had abandoned the contract by nonperformance.

Argentine national), and Juan Carlos Villa (a former commodore in the Argentine Air Force and a former SOMISA executive). Villa, who was the only one of the five partners with any experience either in coal matters or with SOMISA, had died shortly before petitioners filed their initial complaint.

McCall moved, pursuant to Rules 12(b)(7) and 19, F.R.Civ.P., to dismiss the amended complaint for failure to join indispensable parties or, alternatively, for an order requiring joinder. (R. App. C 35a). Before the motion could be heard, Hamrick and Hawkins obtained assignments of rights in litigation from Petersen Enterprises and Ruben Antonio. At a hearing on the motion held on December 15, 1980, the district court ordered Hamrick and Hawkins to join Villa's successor in

interest or obtain an appropriate assignment of Villa's rights in the litigation.

On January 30, 1981, petitioners' original counsel, Robert A. Seefried, Esquire, wrote to Judge Ramsey. (R. App. D 40a). In the letter, Mr. Seefried stated that Hamrick had informed him Ruben Antonio would attempt to obtain the assignment from the Villa estate, but needed additional time. The district court extended the time through and including February 20, 1981. (R. App. E 44a). On February 20, 1981, Seefried again wrote to the court and stated: "Mr. Hamrick has informed me that the assignment has in fact been executed and has been mailed to him . . . ." (R. App. F 47a). Petitioners never filed any assignment from the Villa estate.

On April 17, 1981, petitioners moved for leave to add Ana Maria Aulet Garcia de Villa ("Sra. Villa") as a party-plaintiff. (P. App. 48). In their motion, petitioners alleged that Sra. Villa was Commodore Villa's widow and the guardian of their daughter, and that the daughter was the sole heir of Commodore Villa's estate. In addition, petitioners represented that Sra. Villa had appointed Mr. Seefried "to represent in this litigation whatever interests in the litigation the late Mr. Villa had." (P. App. 49). The authorization to which petitioners' motion apparently referred was a letter dated March 2, 1981. (R. App. G 48a). McCall's counsel did not oppose the motion. (P. App. 49). The district court granted petitioners' motion to add Sra. Villa by order dated July 30, 1981. (P. App. 49).

Sra. Villa, however, had not agreed to join the action as a party-plaintiff as petitioners had represented to the district court. McCall obtained from the Argentine court a duly authenticated copy of an "Answers Hearing" which it filed with the district court, together with a certified Spanish to English translation of the original. (R. App. H 50a). In the Answers Hearing, Sra. Villa informed the Argentine court that she had been contacted by Ruben Antonio; that she had refused to enter the case; that "in view of Mr. Ruben Antonio's insistence, . . . a draft of a model of authorization was prepared"; but that she had retained the original of the authorization. (R. App. H 54a-56a).

Promptly after this revelation and on August 14, 1981, Mr. Seefried with-

drew as petitioners' counsel. Thereafter, J. Nat Hamrick, Sr., Esquire, the father of petitioner J. Nat Hamrick, Jr., entered the case as lead counsel.

On December 1, 1981, Judge Ramsey wrote to counsel. (R. App. I 61a). In the letter, the court noted that during a scheduling conference held the previous month, it had "expressed its view that plaintiffs' failure to accomplish joinder of the necessary parties has caused an unreasonable delay in this case." Judge Ramsey thereupon granted petitioners fifteen (15) days from the date of the letter to accomplish the necessary joinder. Twice thereafter the district court extended the deadline. (R. App. A 4a). During the period of additional delay, petitioners filed motions requesting the district court to appoint a Maryland attorney as guardian

ad litem for Commodore Villa's daughter (P. App. 75) and require a representative of McCall to authenticate a letter, which action petitioners claimed was necessary before the Argentine court would approve joinder of Sra. Villa. (P. App. 79).

On April 12, 1981, some fifteen (15) months after it had ordered joinder of the Villa interest, the district court ruled on all open motions and dismissed petitioners' amended complaint. (R. App. B 11a; P. App. 41).

The court held that Maryland law which provided the rule of decision in the case and Rule 17(c), F.R.Civ.P. did not permit appointment of a guardian ad litem where a general guardian (whom petitioners had represented Sra. Villa to be) existed. The district court similarly held that no representative of

McCall needed to authenticate the signature on the letter because petitioners could do so or, for that matter, the clerk of the court, inasmuch as McCall had incorporated the letter as an exhibit to its answer to petitioners' initial complaint and acknowledged its authenticity.[4/] The district court also denied petitioners' motion to add as parties-plaintiff Petersen Enterprises and Ruben Antonio, who had

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[4/] The conclusion was obviously correct. Petitioners later represented to the court of appeals that after argument on appeal, the Argentine Court had granted Sra. Villa permission to intervene in this suit (P. App. 2-3), notwithstanding that McCall never authenticated the signature on the letter. They repeat their contention before this Court, claiming that after argument at the court of appeals they "obtained approval from the Argentine Children's Court for Ms. Villa's appearance as guardian for her daughter in this action." (Petition at 19).

by then rescinded their assignments to petitioners, because dismissal for petitioners' failure to join the Villa interest rendered the motion moot.

The dismissal had two bases: (1) the court's conclusion that the successor to Commodore Villa's interest was an indispensable party whose joinder was not feasible because located in Argentina; and (2) the petitioners' disobedience of the court order requiring joinder for a period of fifteen (15) months. See page 3, supra.

Petitioners appealed the dismissal to the United States Court of Appeals for the Fourth Circuit.

The court of appeals heard oral argument on January 13, 1983. After argument, but prior to the court of appeals' decision on May 31, 1983, petitioners moved (1) for leave to file

a post-hearing brief; (2) to suspend the Federal Rules of Appellate Procedure to permit them to supplement the record on appeal (P. App. 1); and (3) to amend their motion to suspend the rules and further supplement the record. (P. App. 5). The documents petitioners sought to add to the record were letters from Sra. Villa to their counsel and papers from Argentine courts and officials. The court of appeals denied all of petitioners' post-argument motions. (P. App. 9).

On May 31, 1983, the court of appeals affirmed the decision of the district court. Specifically, it held that dismissal was proper for failure to prosecute and to comply with the district court's order requiring joinder. (R. App. A 1a). Although the court of appeals found that the district court's

dismissal pursuant to Rule 19 was improper (because of the district court's erroneous conclusion that it lacked personal jurisdiction over the Villa interest), it concluded that the petitioners' failure to comply with the district court's order to effect joinder provided an adequate ground to dismiss the amended complaint under Rule 41(b), F.R.Civ.P.

SUMMARY OF ARGUMENT

Petitioners disobeyed the district court's order to join an indispensable party for fifteen (15) months. During this period they falsely represented first that the absent party had assigned its interest to them and, later, had joined the litigation voluntarily. Under the circumstances, the district court did not abuse its discretion in dismissing petitioners' claim. No

action by the district court or the court of appeals warrants review on a writ of certiorari under the standards set forth in Supreme Court Rule 17.1.

ARGUMENT

In view of the presentation in the foregoing Statement of the Case, the McCall response to petitioners' contentions here may be limited. The actions of the district court and court of appeals below are unassailable. Petitioners' failure to join the Villa interest for the fifteen (15) month period following the district court's order to do so should alone compel dismissal. Because this non-feasance was compounded by misrepresentations -- first that the Villa estate had assigned its interest and secondly that Sra. Villa had agreed to participate in the case -- the district court had no choice

but to dismiss the action. As the court of appeals stated:

> The district court had more than ample reason to find a failure to prosecute under the facts of this case. In addition to the inordinate delay, the district court was misled by the assurance of plaintiffs' counsel that an assignment from Villa's estate had been procured and by the subsequent misrepresentation to the court that Mrs. Villa authorized counsel to represent the Villa interests in the case.

(R. App. A 9a-10a).

Petitioners' contention that the courts below not only erred, but that the errors were sufficiently grievous to justify this Court's issuance of a discretionary writ of certiorari, is totally without merit. The claimed conflicts with a decision of this Court and with decisions of other courts of appeals are simply non-existent. Moreover, there is absolutely no basis for

contending, as petitioners do, that the district court and court of appeals in their treatment of the case so far departed from the accepted and usual course of judicial proceedings so as to call for this Court's exercise of its supervisory power. In short, none of the considerations set forth by Supreme Court Rule 17.1 governing review on certiorari is even remotely met.

Petitioners assert that "[t]he decisions in this case are in direct conflict with the opinion in this court" in Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968). (Petition at 7). In Provident Tradesmens this Court held that an automobile owner whose participation in the suit would defeat diversity jurisdiction was not an indispensable party to a suit by the estate of the deceased driver

against the owner's insurer to establish that the deceased driver had operated the vehicle within the scope of the owner's permission.

The absent party in Provident Tradesmens was not a missing partner whose contractual rights as a joint obligee the plaintiff sought to enforce. Federal courts applying the partnership law of states like Maryland which have enacted the Uniform Partnership Act, have consistently held that because partners or co-venturers are joint obligees, all partners or co-venturers must join in bringing suit, and each is an indispensable party-plaintiff to a suit to enforce contract rights. Harrell & Sumner Contracting Co., Inc. v. Peabody Petersen Co., 546 F.2d 1227, 1228-29 (5th Cir. 1977); Bry-Man's, Inc. v. Stute, 312 F.2d 585, 586-87 (5th Cir.

1963); Purcel v. Wells, 236 F.2d 469, 471-72 (10th Cir. 1956); 3A Moore, Federal Practice, ¶19.11 at 19-229 (2d ed. 1982); see Gregory v. Stetson, 133 U.S. 579 (1890).

It is apparent, however, that petitioners are not citing Provident Tradesmens for the proposition that a joint obligee in a contractual action, such as the Villa interest, is not an indispensable party. Rather, the "direct conflict" petitioners perceive flows from Justice Harlan's observation that Rule 19(b), F.R.Civ.P. imposes an "equity and good conscience" test. Provident Tradesmens Bank & Trust Co. v. Patterson, supra, 390 U.S. at 116. Petitioners' reliance on Provident Tradesmens, therefore, comes down to nothing more than their assertion that dismissal in this case was "unfair." Of

course, in Provident Tradesmens there was no question of disobedience of a court order or misrepresentation to judicial officers, factors which the court of appeals found controlling here.

Assertions that the appellate court's decision in this case conflicts with opinions from other circuit courts of appeals are equally specious. Virtually all of the decisions cited involve district court dismissals pursuant to Rule 41(b), F.R.Civ.P., and petitioners rely upon statements or intimations that dismissal is a harsh measure to be tempered with discretion. McCargo v. Hedrick, 545 F.2d 393 (4th Cir. 1976); Graves v. Kaiser Aluminum & Chemical Co., 528 F.2d 1360 (5th Cir. 1976) (per curiam); Reizakis v. Loy, 490 F.2d 1132 (4th Cir. 1974); Dyotherm

Corp. v. Turbo Machine Co., 392 F.2d 146 (3d Cir. 1968); Durgin v. Graham, 372 F.2d 130 (5th Cir. 1967) (per curiam); Lyford v. Carter, 274 F.2d 815 (2d Cir. 1960) (per curiam); Colonial Drive-In Theatre, Inc. v. Warner Bros. Pictures, Inc., 262 F.2d 856 (2d Cir. 1959). Again, none of the cases petitioners cite involves the type of delay or misrepresentation which occurred before the district court.

The remaining decision cited by petitioners is Slade v. Louisiana Power & Light Co., 418 F.2d 125 (5th Cir. 1969), cert. denied, 397 U.S. 1007 (1970), a decision which supports the lower courts' disposition here. In Slade, the Fifth Circuit held that in diversity cases, federal courts should apply the law of the state forum in deciding which guardian has capacity to

sue. Of course, in the instant case, the district court and court of appeals properly applied Maryland law in holding that the general guardian of Commodore Villa's daughter was the only person competent to represent her interests. Under Maryland law, Sra. Villa would be the natural guardian of her minor child. Art. 72A, Md. Code Ann. §1. Sra. Villa was, moreover, according to petitioners "the legal guardian of Mr. Villa's minor daughter." (P. App. 49). Where a general guardian exists, Maryland law will not normally countenance the appointment of a guardian ad litem, in the absence of a conflict of interest or other disqualifying factors. See generally Gradman v. Gradman, 182 Md. 293, 34 A.2d 433 (1943). This same policy is reflected in Rule 17(c), F.R.Civ.P. The district court's

departure from what it found to be the Maryland rule would have been particularly inappropriate here -- where the general guardian had refused to participate and petitioners, who requested appointment of a guardian ad litem, had misrepresented her position.

An examination of the record in this case confirms that the district court and court of appeals acted properly. Neither "so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court, as to call for an exercise of the court's power of supervision." S. Ct. R. 17.1.

The district court first ordered petitioners to join the Villa interest or obtain an appropriate assignment on December 15, 1980, affording them forty-five (45) days to do so. During

the fifteen (15) months between the district court's direction and dismissal on April 11, 1982, petitioners did not "merely" fail to comply with the order; rather, they misled the court by saying that an assignment had been obtained (R. App. F 46a) and that Sra. Villa was voluntarily joining the litigation. (P. App. 48). When the district court "expressed its view that plaintiffs' failure to accomplish joinder of the necessary parties has caused an unreasonable delay in this case" at a November 24, 1981 status conference, but granted petitioners until December 16, 1981 to join the Villa interest (R. App. I 61a), they still failed to comply. Indeed, their response was two dilatory motions, the first to have a Maryland attorney appointed as guardian ad litem (P. App. 75) and the second to

compel McCall to authenticate a document, because they alleged McCall's authentication was necessary to obtain the Argentine court's approval for Sra. Villa to intervene. (P. App. 79). As just discussed, the first motion was improper. The frivolousness of the second is best demonstrated by petitioners' contention that after the case was argued in the court of appeals, they obtained approval from the Argentine court without any authentication of the letter by McCall. See page 13, n.4 supra.

This Court has ruled that a district court possesses inherent authority to dismiss an action for failure to prosecute, which may include failure to comply with a court order. Link v. Wabash Railroad Co., 370 U.S. 626, 630-31 (1962). Link v. Wabash further

holds that the trial court may act sua sponte; that it should consider the entire progress of the litigation, and that the standard of review is abuse of discretion. Id. at 630 and 633. The actions of the lower courts were well within the limitations which this Court has imposed for dismissals for failure to prosecute and for disobedience of court orders.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Calhoun Bond
Morton A. Sacks
Thomas L. Crowe
Ray R. Fidler

Cable, McDaniel, Bowie
& Bond
900 Blaustein Building
Baltimore, Maryland 21201
(301) 752-3650

Counsel for Respondents

APPENDICES

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1402

C. Dula Hawkins, J. Nat Hamrick, Jr., Ana Marie Aulet Garcia deVilla, guardian for Maria Florencia Villa Aulet,

Appellants,

v.

JNO McCall Coal Export Corporation, JNO McCall Coal Company, Inc.,

Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Norman P. Ramsey, District Judge.

Argued: January 13, 1983 Decided: May 31, 1983

Before HALL, MURNAGHAN and SPROUSE, Circuit Judges.

J. Nat Hamrick (Hamrick & Hamrick; Andrew J. Graham, Kramon & Graham, P.A. on brief) for Appellants; Ray R. Fidler (Morton A. Sacks, Thomas L. Crowe, Cable, McDaniel, Bowie & Bond on brief) for Appellees.

PER CURIAM:

C. Dula Hawkins and J. Nat Hamrick, Jr. (the plaintiffs) appeal from the district court's dismissal of their contract action against JNO McCall Coal Export Corporation and JNO McCall Coal Company (McCall). The district court's dismissal erroneously was based on Federal Rule Civil Procedure 19(b). Since, however, the dismissal properly could have been grounded on Federal Rule Civil Procedure 41(b), we affirm.

The complaint below alleged an oral contract in which McCall promised to use the services of a five-person joint venture (which included the plaintiffs) to sell coal to a government-owned steelmaking corporation in Argentina. The complaint further alleged that McCall violated the contract and sold

coal directly to the Argentine company, failing to pay plaintiffs' [sic] their commissions. This appeal, however, involves procedural issues, rather than substantive contract issues.

The five members of the joint venture included the plaintiffs, Petersen Enterprises, Inc., Ruben Antonio and Juan Carlos Villa. Villa, an Argentine citizen, died prior to the commencement of this action and his sole heir was a minor daughter, Maria, who is also a citizen of Argentina. The plaintiffs did not refer to these other members in either their original or amended complaint. After depositions revealed their participation, however, McCall moved for a Rule 19 dismissal, asserting that all five members were necessary and indispensable parties.

McCall moved, in the alternative, for an order requiring plaintiffs to join the absent joint venturers. The plaintiffs thereafter secured assignments from Antonio and Petersen of their interests in the joint venture.

On December 15, 1980, the district court gave the plaintiffs 45 days either to secure an assignment from the Villa heir or to join her. The court subsequently granted two extensions of its order upon assurances from the plaintiffs that they would comply with it. The court granted the second extension after plaintiffs' counsel stated in a letter to the court that an assignment of the Villa interest had been executed and would be forthcoming. The plaintiff, however, never filed such an assignment.

On April 17, 1981, the plaintiffs moved to add Maria Villa's mother as a party plaintiff. The motion asserted that the mother "is the legal guardian of Mr. Villa's minor daughter. She has appointed the undersigned to represent in this litigation whatever interests in the litigation the late Mr. Villa had." The plaintiffs filed with this motion a copy of the alleged appointment, purportedly signed by Mrs. Villa. On Villa. On July 31, 1981, however, McCall filed authenticated documents from Argentina which revealed that (1) Villa's widow had not authorized anyone to represent the interests of the Villa estate in the litigation, and (2) such authorization required approval from the appropriate Argentine court. Subsequently, plaintiffs' then lead

counsel, Robert Seefried, withdrew as counsel and plaintiffs' current counsel, J. Nat Hamrick, Sr., assumed the role of lead counsel.

At a status conference held on November 24, 1981, the district court advised the plaintiffs that their failure to join the necessary parties[1] had caused undue delay. The court nevertheless allowed plaintiffs an additional fifteen days to effect appropriate joinder. The court twice extended this deadline. During that period, the plaintiffs moved

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[1] In addition to Villa's heir, these parties included Antonio and Petersen, who by November, 1981, had rescinded their assignments. Plaintiffs then moved the court to join Antonio and Petersen as party plaintiffs. The court denied this motion as moot in its dismissal order.

the court to appoint an associate in the law firm of plaintiffs' local counsel as guardian ad litem for Villa's heir, to act as a representative party plaintiff. The plaintiffs also filed a motion seeking to compel the president of McCall to authenticate a letter allegedly necessary to assert joinder of the representative of the Villa interest.

The district court denied these motions and dismissed the entire complaint on April 12, 1982. In its dismissal order, the court stated that the Villa heir was an indispensable party. It further found that her joinder was not feasible, principally because the court lacked in personam jurisdiction over her. The court then weighed the factors mandated by Rule

19(b) and in exercise of its discretion granted McCall's motion to dismiss.

We think the district court incorrectly assumed that it did not have in personam jurisdiction over the Villa heir. The Maryland long-arm statute provides the requisite basis for in personam jurisdiction under the facts of this case. Md. Cts. & Jud. Proc. Code Ann. §6-103(b)(1) (Rep. Vol. 1980). See also Md. R.P. 107 (a)(4) (Rep. Vol. 1977); Fed. R. Civ. P. 4(e), (i)(1).

Although, as we have indicated, joinder was feasible, the plaintiffs failed to comply with the court's order to effect joinder for a period of fifteen months. This failure provided the court with adequate grounds to dismiss the complaint under Federal Rule Civil Procedure 41(b). That rule

provides in pertinent part: "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him." The failure of a plaintiff to join a party after the court rules that it is an indispensable party may result in dismissal of the plaintiffs' action for failure to prosecute under Rule 41(b). See English v. Seaboard Coast Line Railroad Co., 465 F.2d 43, 47-48 (5th Cir. 1972); Transit Casualty Co. v. Security Trust Co., 396 F.2d 803 (5th Cir. 1968). The district court had more than ample reason to find a failure to prosecute under the facts of this case. In addition to the inordinate delay, the district court was misled by the assurance of plaintiffs'

counsel that an assignment from Villa's estate had been procured and by the subsequent misrepresentation to the court that Mrs. Villa authorized counsel to represent the Villa interests in the case.

We have reviewed plaintiffs' other two assignments of error and find no merit in them. The judgment of the district court therefore is affirmed.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

C. DULA HAWKINS, ET AL., :
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Plaintiffs, :
:
v. : CIVIL ACTION NO.
: R-80-774
JNO. McCALL COAL EXPORT CORP., ET AL., :
:
Defendants :
:

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MEMORANDUM AND ORDER

This suit arises out of an alleged breach of a verbal agreement by five members of a joint venture or partnership -- two of whom are plaintiffs, C. Dula Hawkins ("Hawkins") and J. Nat Hamrick, Jr. ("Hamrick") -- and defendants. The venture allegedly was in connection with certain proposed coal

transactions. Although the amended complaint contains three counts, the same transaction is common to each count. In November, 1980, defendants filed a motion to dismiss the amended complaint for failure to join necessary and indispensible parties, namely Petersen Enterprises, Inc. ("Petersen"), Ruben Antonio ("Antonio"), and the representative of the estate of one of the deceased venturers, Juan Carlos Villa ("Villa"). Plaintiffs purportedly secured assignments from Antonio and Petersen and at the hearing held on December 15, 1980, the Court reserved ruling and afforded plaintiffs a period of forty-five (45) days in which to secure an assignment from the successor to the Villa interest. This period was twice extended at plaintiffs' request,

the second extension coming after plaintiff Hamrick informed counsel that the assignment had in fact been executed and was in the mail. On April 20, 1981, a motion to add Villa's widow (Ana Maria Aultet [sic] Garcia) as a party plaintiff was filed, but on July 31, 1981, authenticated documents from Argentina were filed which revealed that (1) Villa's widow had not inherited his estate -- a minor daughter (Maria Florencia Villa de Aulet) -- being the apparent beneficiary, (2) Villa's widow had not given her authorization for anyone to represent the interests of the Villa estate in this litigation, and (3) judicial approval for any such authorization from the Argentine court would be required. Subsequently, plaintiffs' then lead counsel, Robert

Seefried, withdrew his appearance and that of plaintiffs' current counsel, J. Nat Hamrick, Sr., was entered.

In September and October, 1981, Antonio and Roland Petersen were deposed at which time they informed counsel for defendants that the assignments of their interests had been rescinded and they intended to join as parties plaintiff. At the status conference held on November 24, 1981, the Court expressed the view that plaintiffs' failure to accomplish joinder of the necessary parties had occasioned undue delay in this case. Plaintiffs were nevertheless allowed fifteen days to achieve the joinder they believed necessary. On November 30, 1981, a motion to join Petersen and Antonio as parties-plaintiff was filed. The Court indi-

cated that it would not rule on the motion for joinder until plaintiffs had accomplished the joinder of all necessary parties. At the request of counsel for plaintiffs, the fifteen day deadline for obtaining complete joinder was twice extended. As of this date plaintiffs have not moved to join the representative of the Villa estate as a party plaintiff. Plaintiffs have, however, filed other motions in its stead; which motions now have been fully briefed by plaintiffs and defendants. Currently open and ready for decision are the following motions:

1. Defendants' Motion to Dismiss Amended Complaint for Failure to Join Necessary and Indispensible Parties.

2. Plaintiffs' Motion to Add Additional Parties Plaintiff.

3. Plaintiffs' Motion to Appoint Guardian.

4. Plaintiffs' Motion to Compel Authentication of Document.

The Court rules pursuant to Local Rule 6 seeing no need for further argument.

The initial question is whether the representative of the Villa estate is an indispensible party under F.R.Civ.P. 19.[1/] The starting point of this inquiry is Rule 19(a) -- "Persons to be Joined if Feasible." Under that rule, the court must, as a threshold determination, decide whether joinder

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1/ Plaintiffs having filed a motion to join Petersen Enterprises, Inc. and Ruben Antonio as parties plaintiff, the only interest of plaintiffs' negotiating group unrepresented is that of the late Juan Carlos Villa.

would be desirable for a just adjudication of this action.

Without deciding the precise legal status of the plaintiffs' business group, it is clear that the five members of the group were engaged in a joint venture for profit, each to share equally in any and all commissions of the venture. In contract actions in federal court "(j)oint obligees .... usually have been held indispensible parties and their nonjoinder has led to a dismissal of the action." 7 Wright & Miller, Federal Practice and Procedure §1613 at p. 126 (1972). See, e.g., Harrell & Sumner Contracting Co. v. Peabody Petersen Co., 546 F.2d 1227 (5th Cir. 1977); Republic Realty Mortgage Corp. v. Eagson Corp., 68 F.R.D. 218 (E.D. Pa. 1975). Moreover, in their

brief in opposition to defendants' motion to dismiss, filed January 14, 1982, plaintiffs now appear to concede that each of the living members of the group and the representative of the Villa interest, are parties who should be joined to this lawsuit. It is clear, therefore, that joinder of each member of the plaintiffs' group or their successor in interest, is desirable in this case.

Under Rule 19(a), if a person who should be joined has not been joined and his joinder is feasible, the court shall order that he be made a party. Petersen and Antonio have moved to join as plaintiffs in this lawsuit, therefore an order by the Court that Petersen and Antonio be made parties in [sic] unnecessary. As to the representative of

the Villa estate, however, such an order would be appropriate if joinder is feasible.

It is apparent that joinder of Villa's successor in interest, his minor daughter, Maria Florencia Villa de Aulet ("Maria"), is not feasible. Maria currently resides in Argentina, beyond the process and jurisdiction of this Court. Moreover, plaintiffs have been given a reasonable opportunity to add her as a party, having been ordered to obtain joinder over fifteen months ago and having been given numerous extensions of time based on counsel's representations to the Court that joinder was imminent.

In an effort to make joinder of the Villa interest feasible, plaintiffs have moved to appoint an associate of their local counsel, C. Thomas Williamson,

III, as the guardian ad litem to act for Maria to the end that he may intervene in this action in a representative capacity as a party plaintiff. Plaintiffs argue that since the Court has the power to make a recalcitrant potential plaintiff an involuntary plaintiff, when that person is beyond the jurisdiction of the Court, it has the power to appoint a guardian ad litem for a non-resident minor who has a cause of action in this Court.

Plaintiffs' theory is fatally flawed in several respects. First, there has been no determination that if Villa were still alive, the Court would make him an involuntary plaintiff if he chose not to join this litigation. Under Rule 19(a), a recalcitrant plaintiff can only be made an involuntary

plaintiff "in a proper case." The typical application of this procedure has been to allow exclusive licensees of patents and copyrights to make the owner of the monopoly an involuntary plaintiff in infringement suits. Wright & Miller, supra at §1606. Although the involuntary plaintiff doctrine has been applied by some courts to join persons other than exclusive licensees of patents or copyrights, the Court is satisfied that the instant action does not present a proper case for its application. See Rosen v. Rex Amusement Co., 14 F.R.D. 75 (D.D.C. 1952). As the Court of Appeals for the Fifth Circuit noted in Eikel v. State Marine Lines, Inc., 473 F.2d 959, 962 (5th Cir. 1973), "(t)he 'proper case' is meant to cover only those instances where the absent party has

either a duty to allow the plaintiff to use his name in the action or some sort of an obligation to join plaintiff in the action."

Second, plaintiffs' motion completely ignores the Court's lack of in personam jurisdiction over Maria and the concomitant lack of power to appoint a guardian ad litem to act for her in this lawsuit. See Tryforos v. Icarian Development Co., S.A., 518 F.2d 1258 (7th Cir. 1975), cert. denied, 423 U.S. 1091 (1976).

Third, under Maryland law, to which this Court looks under Rule 17(b) to determine the capacity of guardians to sue for minors, see Vroon v. Templin, 278 F.2d 345 (4th Cir. 1960), a guardian ad litem typically will not be appointed (in the absence of conflicting interest)

when a general guardian already exists. See generally Gradman v. Gradman, 182 Md. 293, 303 (1943). F.R.Civ.P. 17(c) similarly conditions the appointment of a guardian ad litem on the absence of a general guardian. Sra. Aulet Garcia de Villa, as the surviving parent, is Maria's general guardian under Maryland law. Md. Ann. Code, Art. 72A, §1. Moreover, in their motion to add an additional party as plaintiff filed on April 20, 1981, plaintiffs represented to the Court that Sra. Aulet Garcia de Villa had been appointed guardian of her daughter by an Argentine court. Plaintiffs' motion for appointment of a guardian ad litem will be denied.

In a further effort to make joinder of the Villa interest feasible, plaintiffs have moved for an order compelling

John McCall, Jr. to acknowledge his signature before a notary public. Plaintiffs argue that such acknowledgement and authentication by the Argentine Consul is required by a children's court in Buenos Aires, Argentina before an order by that court permitting the minor daughter to appear through her mother as a plaintiff in this action will be entered. Defendants concede the authenticity of the letter in question, but refuse to assume any burden regarding establishment of its authenticity.

Plaintiffs have not stated any reason why authentication by defendants is essential in this case. Specifically, they have not established why an authentication by the Clerk of the Court or by witnesses to the signing, options available to them since this

lawsuit was filed, is inadequate. In the absence of such a showing there is no reason why the court should obligate defendants to assist plaintiffs in structuring their lawsuit.

Notwithstanding the fact that the representative of the Villa estates is a party that cannot be feasibly joined, plaintiffs argue that this suit should be allowed to proceed under Rule 19(b):

> (b) Determination by Court whenever Joinder is not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensible. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the

> extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

In discussing the first factor -- the extent to which a judgment entered in the person's absence might be prejudicial to him or those already parties -- and the second factor -- the extent to which prejudice can be lessened by protective provisions in the judgment -- plaintiffs propose the following: (1) plaintiffs will ask the Court to hold in trust one-fifth of any recovery for the benefit of the successor to the Villa interest and in the event the action does not result in a judgment favorable

to plaintiffs, the successor to the Villa interest will be protected from any risk or loss as a result of this action; and (2) neither the widow of Villa nor his minor daughter have any knowledge of these transactions and the persons having such knowledge are parties or have asked to be made parties.

Without commenting on the protection plaintiffs' position affords to the holder of the Villa interest, it is clear that plaintiffs' proposal completely overlooks the prejudice that might result to defendants. As Professors Wright and Miller have noted, the emphasis on prejudice entails

> both the need to protect absent persons from litigation that might adversely affect their interests in the subject matter of the action and the

> need to protect those who are parties from the threat of multiple actions, which would involve additional expense to the litigants and to the judicial system, and would increase the possibility of inconsistent determinations.

Wright & Miller, supra at §1608, p. 67. Similarly, in Potomac Electric Power Co. v. Babock & Wilcox Co., 54 F.R.D. 486, 492 (D. Md. 1972), in granting defendants' motion to dismiss for lack of joinder of indispensible parties, Judge Harvey observed that "there is at the present time a risk that the (absent parties) could re-litigate the issues prosecuted here, or at a very minimum, require the defendants to come into another court and prove that principles of res judicata or collateral estoppel did apply in any subsequent action." The same risks are present in this case,

yet plaintiffs' "solution" provides no adequate protection. Moreover, the representative of the Villa estate being beyond the jurisdictional reach of this Court, this is not a case where defendants would be in a position to bring in absent persons who could not be joined as original parties by means of defensive interpleader, or by using interpleader or asserting a counterclaim under Rule 13(h) that falls within the ancillary jurisdiction of the Court. Wright & Miller, supra at §1608, pp. 74-75; see B. L. Schrader, v. Anderson Lumber Co., 257 F.Supp. 794 (D. Md. 1966); MacBryde v. Burnett, 41 F.Supp. 661 (D. Md. 1941).

With respect to the third factor -- whether a judgment rendered in the person's absence will be adequate -- the

Court will assume, without deciding that any judgment rendered in the absence of the representative of the Villa estate would be adequate under the protective provisions proposed by plaintiffs.

As to the fourth factor -- whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder -- plaintiffs argue that if this case is dismissed they will have no adequate remedy anywhere for the recovery of damages against defendants, since service of defendants can only be obtained in the State of Maryland. Assuming plaintiffs' position is

correct,[2/] when a group of joint venturers of diverse nationalities attempt to enter a contract for the sale of products in international commerce, one of the assumed hazards associated in such a relationship is that an action against the party obligated to the joint venture may not be maintained without joinder of all interested parties. See Rosen v. Rex Amusement Co., supra, 14 F.R.D. at 76. Plaintiffs voluntarily entered into this alleged business transaction and they cannot be heard to complain that one of the consequences of

---

2/ The Court seriously doubts that service of companies shipping coal in interstate and international commerce, as plaintiffs allege, can only be obtained in Maryland. Furthermore, it is possible that plaintiffs' claims are cognizable in the courts of Argentina or some other forum.

this course of dealing works a harsh result on them.

In determining whether "in equity and good conscience" an action should proceed in the absence of a party who should but cannot be joined, the Supreme Court has commented that "[t]he decision whether to dismiss (i.e., the decision whether the person missing is 'indispensible') must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interest." Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 118-19 (1968). Having weighed the Rule 19(b) factors and the other pragmatic considerations present in this case, the Court con-

cludes that it cannot in equity and good conscience allow this action to proceed among the parties before it. Defendants' motion to dismiss will be granted. Since the proposed joinder of Petersen and Antonio will not achieve the complete joinder required in this case, plaintiffs' motion to join Petersen and Antonio as parties plaintiff will be declared moot.

For the reasons stated herein, it is this 12th day of April, 1982, by the United States District Court for the District of Maryland,

ORDERED:

1. That plaintiffs' motion for appointment of a guardian ad litem is DENIED;

2. That plaintiffs' motion to compel authentication of a document is DENIED;

3. That defendants' motion to dismiss is GRANTED;

4. That plaintiffs' motion to add additional parties plaintiff is declared MOOT;

and

5. That the Clerk will mail copies of the Memorandum and Order to all counsel of record.

/s/Norman P. Ramsey
Norman P. Ramsey
United States
District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

C. DULA HAWKINS, and J. NAT HAMRICK, JR.	*	
Plaintiffs	*	
v.	*	CIVIL ACTION NO. R-80-774
JNO. McCALL COAL EXPORT CORP. and JNO. McCALL COAL CO., INC.,	*	
Defendants	*	

* * * * * * * * *

DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT FOR FAILURE TO JOIN NECESSARY AND INDISPENSABLE PARTIES

The Defendants, Jno. McCall Coal Export Corp. and Jno. McCall Coal Co., Inc., (hereafter jointly referred to as "McCall"), by their counsel, invoking Rules 12(b)(7) and 19 of the Federal Rules of Civil Procedure, move to

dismiss the Amended Complaint filed herein for Plaintiffs' failure to join necessary and indispensable parties, and as cause therefore say:

1. As shown in the attached Memorandum In Support of Defendants' Motion To Dismiss Amended Complaint For Failure To Join Necessary and Indispensable Parties, Defendants have taken the depositions of each of the Plaintiffs in this case and their testimony has disclosed that such Plaintiffs comprise only two of a five member partnership or joint venture which dealt with the Defendants in connection with the alleged contract sued upon. The deposition testimony of the Plaintiffs has also revealed that each of the five members of the partnership or joint venture (hereafter the "Hamrick Group")

agreed to share equally in 20% shares (with one minor exception not here relevant) any and all proceeds obtained by the Hamrick Group from its transactions with McCall. Accordingly, assuming arguendo that McCall has any obligation whatsoever arising from the transactions which are the subject of the Amended Complaint, that obligation would necessarily run to each of the five members of the Hamrick Group as joint obligees and not merely to the two members of such Group who have brought suit.

2. The three members of the Hamrick Group who have not but should have joined as parties plaintiff are Roland L. Petersen of Orlando, Florida, Ruben Antonio of Buenos Aires, Argentina and the personal representative of the

estate of Juan Carlos Villa, late of Buenos Aires, Argentina, who died in 1978.

3. If the Amended Complaint is not dismissed outright for failure of the absent partners or joint venturers to have joined as plaintiffs herein, which Defendants submit would be appropriate, then it is alternatively submitted that Plaintiffs should be ordered to secure the joinder of their absent partners as parties plaintiff, so that all persons who are interested in the subject matter of this action and whose rights and liabilities, if any, will be materially affected by its determination will be before the Court. If joinder of the three absent members of the Hamrick Group is not thereafter perfected in

accordance with such Order, the Amended Complaint should then be dismissed.

Respectfully submitted,

CABLE, McDANIEL, BOWIE & BOND

By /s/Morton A. Sacks
Morton A. Sacks

/s/Thomas L. Crowe
Thomas L. Crowe
900 Blaustein Building
One North Charles Street
Baltimore, Maryland 21201
(301) 752-3650

Attorneys for Defendants

APPENDIX D

Law Offices
SEYMOUR & DUDLEY
Chartered
1901 L Street, Northwest
Washington, D.C. 20036

January 30, 1981

The Honorable Norman P. Ramsey
United States District Judge
United States Courthouse
101 West Lombard Street
Baltimore, MD 21201

Re: C. D. Hawkins, et al. v. Jno. McCall Coal Export Corp., et al.
Civil Action No. R-80-774

Dear Judge Ramsey:

At the hearing on December 15, 1980, concerning defendants' motion to dismiss the amended complaint filed in this action, Your Honor graciously granted plaintiffs an opportunity to secure an assignment to them of the claims that the estate of Juan Carlos

Villa may have against defendants arising out of the events underlying the lawsuit. My client, J. Nat Hamrick, Jr., has informed me that he has not been able to reach Mr. Ruben Antonio of Buenos Aires, Argentina, to assist in this regard. Apparently, Mr. Antonio has not yet returned to Buenos Aires from an extended trip to several European countries and Paraguay, although Mr. Hamrick understands that Mr. Antonio will be home around February 1.

Accordingly, plaintiffs respectfully request the indulgence of the Court and seek additional time to

attempt to secure the assignment to plaintiffs of the estate's interests in this litigation. Mr. Hamrick believes that if he is able to reach Mr. Antonio, the matter could be resolved within the next two weeks. Inasmuch as Your Honor has granted a stay of general discovery in this litigation pending Your Honor's decision on defendants' motion to dismiss, I see no prejudice to defendants in permitting plaintiffs additional time within which to pursue this matter.

I will, of course, keep Your Honor fully apprised of any developments in this regard as they occur.

Respectfully,

/s/Robert A. Seefried

Robert A. Seefried
Counsel for Plaintiffs

RAS/kar

cc: Morton A. Sacks
Counsel for Defendants

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MARYLAND
UNITED STATES COURTHOUSE
101 West Lombard Street
Baltimore, Maryland 21201

NORMAN P. RAMSEY
United States District Judge

February 3, 1981

Robert A. Seefried, Esquire
1901 L Street, N.W.
Washington, D. C. 20036

Re: Hawkins, et al. v. Jno. McCall Coal Export, et al. Civil Action No. R-80-774

Dear Mr. Seefried:

I am in receipt of your letter of January 30, 1981, in which you request an extension of time within which to secure an assignment from the estate of Juan Carlos Villa. Based on your assurances that the matter will take approximately two weeks to resolve once

Mr. Antonio can be contacted, I am hereby extending the time within which the assignment must be secured to the close of business on February 20, 1981.

Very truly yours,

/s/Norman P. Ramsey

Norman P. Ramsey
United States
District Judge

NPR:dbl
cc: Morton A. Sacks, Esquire

APPENDIX F

Law Offices
SEYMOUR & DUDLEY
Chartered
1901 L Street, Northwest
Washington, D.C. 20036

February 20, 1981

The Honorable Norman P. Ramsey
United States District Judge
United States Courthouse
101 West Lombard Street
Baltimore, MD 21201

Re: C. D. Hawkins, et al. v. Jno. McCall Coal Export Corp., et al. Civil Action No. R-80-774

Dear Judge Ramsey:

This is in response to Your Honor's letter dated February 3, 1981, in which you extended the time within which plaintiffs were to secure an assignment of claims from the estate of Juan Carlos Villa. I have been in contact with my client, Mr. Hamrick, Jr., the last two

weeks and had fully expected to have the assignment filed with the Court as of this date.

Mr. Hamrick has informed me that the assignment has in fact been executed and has been mailed to him, but apparently because of delays in the mail delivery he has not yet received the assignment from Argentina. As soon as he receives the assignment he will special deliver it to me and I will have it filed with the Court. Accordingly, I must respectfully request a brief extension of time within which to conclude this matter.

Respectfully,

/s/Robert A. Seefried

Robert A. Seefried

RAS/kar
cc: Morton A. Sacks

APPENDIX G

Date: Buenos Aires,
marzo 2 de 1981.

Mr. J. Nat Hamrick, Sr.
Hamrick and Hamrick
Attorney's at Law
Po. O. Drawer 470
Rutherfordton, North Carolina 28139
U. S. A.

Dear Mr. Hamrick:

This is to appoint you and the law firm, Seymour & Dudley to represent the estate of Juan Carlos Villa, in the litigation you now have pending against Jno. McCall Coal Company in the United States District Court of Maryland.

I understand that the estate will not be responsible for any attorney's fees, unless there is a recovery in this action and from said recovery, the estate would pay its' proportionate share of such a fee.

Regards.

/s/Aulet Garcia
Ana María Aulet García de Villa

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

C. DULA HAWKINS	*	
J. NAT HAMRICK, JR.	*	
and	*	
ANA MARIA AULET GARCIA de VILLA	*	CIVIL ACTION NO. R-80-774
Plaintiffs	*	
v.	*	
JNO. McCALL COAL EXPORT CORP.	*	
and	*	
JNO. McCALL COAL CO., INC.	*	
Defendants	*	

REQUEST TO FILE

Mr. Clerk:

Please file the attached:

1. Copy of "Answers Hearing" submitted by Ana Maria Aulet Garcia to

an Argentine Judge with responsibility for the Estate Proceedings concerning the late Juan Carlos Villa, which copy of the "Answers Hearing" is in the Spanish language, certified by an Argentine Notary and, in turn, certified by a Vice Consul of the United States of America; and

2. A translation of the aforementioned "Answers Hearing" from Spanish to the English language, which translation is certified, under seal, by an Argentine translator and, in turn,

certified by a Vice Consul of the United States of America.

Respectfully submitted,

CABLE, McDANIEL, BOWIE & BOND

By /s/Morton A. Sacks (tlc)
Morton A. Sacks

/s/Thomas L. Crowe
Thomas L. Crowe
One North Charles Street
Blaustein Building
Baltimore, Maryland 21201
(301) 752-3650

Attorneys for Defendants

ANSWERS HEARING

HONORABLE JUDGE:

ANA MARIA AULET GARCIA, Registry N° 11918, Volume 25 Folio 243, in her capacity as mother of the minor MARIA FLORENCIA VILLA, with legal domicile located at Viamonte 2040, 5° "B", in the proceedings entitled: VILLA JUAN CARLOS/ON ESTATE PROCEEDINGS, informs Your Honor as follows:

1. - That in due time and form I proceed to answer the notification conferred, for which purpose I present the following statements:

2. - That in order to clarify the presumed authorization or mandate referred to in Item 1 of the writ appearing at folio 248, by this present I state that same was never agreed in an authentic manner.

In this connection I wish to inform that I was interviewed by Mr. Ruben Antonio, who stated he had been a personal friend of my deceased husband, and who likewise stated that he had to discuss a matter related to the interests of the minor Maria Florencia Villa.

Once said interview was effected, he informed me of the possible existence of an eventual litigious credit for an amount which he could not establish against a firm of the United States of America, not being able to produce the corresponding documents.

He only stated that the beneficiaries of the above mentioned credit would be Messrs. C. Dula Haekins [sic], Nat Hambrick [sic], Jr., Roland I. Petersen, Ruben Antonio and the Estate

of Juan Carlos Villa, my authorization being necessary in accordance with that provided for by the United States laws.

Having consulted my attorney at law and Mr. Ruben Antonio, he was informed that prior to the granting of an authorization the intervention of the Honorable Judge in charge of the estate proceedings is indispensable as well as the presentation of all the elements evidencing the authenticity of the credit.

I also informed him of my uneasiness regarding the eventual costs to be paid in the event the action is not accepted.

Nevertheless, in view of Mr. Ruben Antonio's insistence, as it was a case of a joint action, a draft of a model of authorization was prepared,

the original of which is in my possession and is attached to this act, that would be submitted for its final presentation with the authorization of the Court provided Mr. Ruben Antonio submitted all the elements mentioned above and through which his claim would be feasible in the present proceedings.

As no elements were submitted nor any news received from the attorneys mentioned in the documents attached by the appearer, to which is added: 1st) that I had no knowledge of my husband's business; 2nd) that I never had knowledge of the present negotiation; 3rd) that I had never met Mr. Ruben Antonio and considered it contrary to law and lacking seriousness to effect any kind of presentation in these proceedings.

Having fulfilled that requested by Minors Adviser I am at the disposal of Your Honor and of the above mentioned Official in order to submit any clarification in these proceedings.

4. - Taking into consideration that the appearer could assume the capacity as interested party and contrary to the discussion of the presumed litigious credit, I consider that it would not be advisable that the answer to the writ be known by same, as same would be in an advantageous position on knowing the situation of the eventual future counterpart.

In accordance with the foregoing statements, I request that this writ be reserved by the Secretariat, as same is submitted for

the information of Your Honor and of the Minors Adviser.

5. - Taking into consideration that in the proceedings there still exists a presentation not corresponding to the decedent's heirs of a litigious nature, I request Your Honor a rigorous reserve on the proceedings, in the sense that same be kept in the safe of the Court and that same may be only verified by the parties and their attorneys at law.

6. In accordance with the foregoing statements, I request Your Honor:

1. To be considered in time and form as answered the conferred notification and the requested certification as rejected.

2. The intimation requested in Item 3 be effected.
3. Ordain the reserve of the present writ.
4. Dispose the reserve of the present writ in the safe of the Court and its examination exclusively by the parties and their respective attorneys at law.

To act accordingly

SHALL BE JUSTICE

I, CARLOS J. CARPENTER, a Public Translator in the Argentine Republic, duly admitted and sworn, residing and practising in the City of Buenos Aires, do hereby certify the foregoing to be a true and accurate translation into English of the document

in the Spanish language hereunto attached.

IN FAITH AND TESTIMONY WHEREOF, I have hereunto set my hand and seal at Buenos Aires, this 17th day of July 1981.

/s/Carlos J. Carpenter

APPENDIX I

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
UNITED STATES COURTHOUSE
101 WEST LOMBARD STREET
BALTIMORE, MARYLAND 21201

NORMAN P. RAMSEY
UNITED STATES DISTRICT JUDGE

December 1, 1981

Andrew Jay Graham, Esquire
Sun Life Building
Charles Center
Baltimore, Maryland 21201

J. Nat Hamrick, Sr., Esquire
P.O. Drawer 470
Rutherfordton, North Carolina 28139

Morton A. Sacks, Esquire
Thomas L. Crowe, Esquire
One North Charles Street
Baltimore, Maryland 21201

Re: C. Dula Hawkins, et al. v.
Jno. McCall Coal Export Corp.,
et al. - Civil Action No.
R-80-774

Dear Counsel:

At the status conference held on November 24, 1981, in the above-captioned case and attended by

Andrew Graham for plaintiffs and Morton Sacks for defendants, the Court expressed its view that plaintiffs' failure to accomplish joinder of the necessary parties has caused an unreasonable delay in this case. Nearly one year ago a hearing was held on defendants' motion to dismiss the amended complaint for failure to join necessary and indispensible parties. At that time the Court withheld ruling on defendants' motion, opting instead to allow plaintiffs the opportunity to secure assignments from or joinder of necessary parties. The Court has twice extended the time by which plaintiffs were to have cured any necessary party defects. Furthermore, the time for

completing discovery concerning asignments of interest, having twice been extended on plaintiffs' motions, ended on November 2, 1981.

As I indicated to counsel at the conference, I do not intend to allow this already protracted litigation to continue on its present course. Plaintiffs, therefore, shall have fifteen days from this date to accomplish the joinder they believe necessary in this case and file the appropriate papers with the Clerk. At the end of that time if joinder has not

been obtained I will rule promptly on defendants' motion to dismiss.

Very truly yours,

/s/Norman P. Ramsey

Norman P. Ramsey
United States District Judge

NPR:dbl

P.S. The Court has received this date copies of plaintiffs' motion to add Petersen Enterprises, Inc., and Ruben Antonia [sic] as parties plaintiff.